Nov 21, 78. arg! W. H. Swayne

7 Otto 1438

Oct. T. 1876

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~337~~ 76

RICHARD P. STOLL, COLLECTOR, AND A. H. BOWMAN, DEPUTY COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

ROBERT P. PEPPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED DECEMBER 31, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 337.

RICHARD P. STOLL, COLLECTOR, AND A. H. BOWMAN, DEPUTY COLLECTOR OF INTERNAL REVEUNE, PLAINTIFF IN ERROR,

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1 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To Robert P. Pepper, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the 11th day of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the said district of Kentucky, wherein Richard P. Stoll and A. H. Bowman, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of December, in the year of our Lord 1874, and of our Independence the 99th.

[SEAL.] BLAND BALLARD.

2 Executed by delivering a copy of the within citation to Martin Bipir, the attorney of record of Robert P. Pepper, this 5th day of December, 1874.

E. H. MURRAY,
U. S. M., K. D.,
By HENRY DIVEN, *D. M.*

Marshal's fee, $2.00.

(Indorsed:) Rob't P. Pepper vs. R. P. Stoll et al. Citation, &c.

3 UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America, to the judges of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Robert P. Pepper, plaintiff, and Richard P. Stoll and A. H. Bowman, defendants, a manifest error hath happened to the great damage of the said Richard P. Stoll and A. H. Bowman, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, at Washington City, together with this writ, so that you have the same at the city of Washington, on the first day of our next October term in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court at Louisville, in said district, this 5th day of December, A. D. 1874, and of the Independence of the United States the ninety-ninth.

W. A. MERIWETHER,
C. C. C., K. D.

Allowed by—

BLAND BALLARD.

4 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To A. H. Bowman & Richard P. Stoll, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the 11th day of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the said district of Kentucky, wherein Robert P. Pepper is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of December, in the year of our Lord 1874, and of our Independence the 99th.

[SEAL.] BLAND BALLARD.

5 UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Robert P. Pepper, plaintiffs, and Richard P. Stoll and A. H. Bowman, defendants, a manifest error hath happened, to the great damage of the said Robert P. Pepper, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, together with this writ, so that you have the same at the city of Washington on the first day of our next October term in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court at Louisville, in said district, this 5th day of December, A. D. 1874, and of the Independence of the United States the ninety-ninth.

[SEAL.] W. A. MERIWETHER,
C. C. C. K. D.

Allowed by—

BLAND BALLARD.

6 Proceedings of the circuit court of the United States for the Kentucky district, at a regular term, begun and held at the Federal court hall, in the city of Louisville, on Monday, the 5th day of October, A. D. 1874.

Present, Hon. Bland Ballard, judge of the United States for the Kentucky district.

ROBERT P. PEPPER
vs.
RICHARD P. STOLL & A. H. BOWMAN.

Be it remembered that heretofore, to wit, on the 14th day of February, 1874, came the defendants, Richard P. Stoll & A. H. Bowman, by Wharton & Bullitt, their attorneys, and filed in the clerk's office of said court their petition, affidavit, and certificate of counsel, which are as follows:

Petition.

To the judges of the circuit of the United States for the district of Kentucky:

Your petitioners, A. H. Bowman and Richard P. Stoll, respectfully state that they are respectively collector and deputy collector of United States internal revenue, within and for the 7th collection district of the State of Kentucky, duly appointed, qualified, and acting as such;
7 that on the day of Jan'y, A. D. 1874, one R. P. Pepper, a distiller, within the collection district aforesaid, filed his petition in the Franklin circuit court, at Frankfort, Kentucky, in which he seeks to recover from your petitioners a large sum of money, viz, $5,000, as damages for the alleged seizure and sale of gallons of whiskey, claimed by the said Pepper, on the day of Jan'y, 1874.

Your petitioners further state that said act complained of in said petition of the said R. P. Pepper were done by them, if done at all, in their capacity as revenue officers of the United States, and under color and by virtue of the internal-revenue laws of the United States, and not otherwise. A copy of said petition is filed herewith, as part hereof.

Wherefore your petitioners pray that a writ of certiorari be issued by this hon. court, directing said Franklin circuit court to send to this hon. court the record and proceedings in said case against your petitioners, and they will ever pray, &c.

Affidavit.

Richard P. Stoll says that he has read the foregoing petition, and that the facts therein stated and set forth are true.

RICHARD P. STOLL.

Subscribed and sworn to before me this 14th day of February, 1874.

W. A. MERIWETHER,
U. S. Com'r.

Certificate of counsel.

I, W. A. Bullitt, as counsel for the above petitioners, hereby
8 certify that I have examined the proceedings against said petitioners and carefully inquired into the matters set forth in the above petition, and believe them to be true.

W. A. BULLITT,
Of Counsel for Petitioners.

Upon which there issued the following writ of certiorari, viz:

Certiorari.

The President of the United States of America to the Franklin circuit court, in the State of Kentucky, greeting:

Whereas Richard P. Stoll and A. H. Bowman, lately officers of the United States, under the revenue laws thereof, have filed their petition in the circuit court of the United States for the district of Kentucky, at Louisville, setting forth that one Rob't P. Pepper has instituted suit in your court against them for acts done under the revenue laws of the United States; which petition has attached thereto the affidavit of said Richard P. Stoll, and the certificate of W. A. Bullitt, esqr., attorney, as required by law:

These are therefor' to require you to send to our said circuit court of the United States for the district of Kentucky, at Louisville, the record and proceeding had in said cause of Robert P. Pepper vs. Richard P. Stoll and A. H. Bowman, in said Franklin circuit court, so that the same shall be in our said circuit court before the judges thereof at the Federal court hall, in the city of Louisville, on the first day of
9 our next October term, the 5th day of October, 1874.

Witness the Hon. Nathan Clifford, associate justice of the Supreme Court of the United States, and the seal of our said circuit court, this 14th day of February, A. D. 1874.

[SEAL.] W. A. MERIWETHER, *Clk*,
By SAM. B. CRAIL, *Deputy*.

Upon which the marshal made the following return, viz:

Marshal's return.

Executed on P. W. Major, judge of the Franklin circuit court, in the State of Kentucky, by giving to him a copy of this process this 17th day of February, 1874.

E. H. MURRAY, *U. S. M., K. D.*,
By F. D. REDDISH, *Spe'l Dep'ty*.

And afterwards, on the 16th day of March, 1874, the clerk of the Franklin circuit court transmitted to this court the following record of the proceedings had in the said Franklin circuit court, viz:

Record of State court.

Franklin circuit court.

ROBERT P. PEPPER, PL'Ft, ag't
RICHARD P. STOLL AND A. H. BOWMAN, DEfendants. } Petition.

The plaintiff, Robert P. Pepper, states that on the day of January, 1874, the defendants, Richard P. Stoll and A. H. Bowman, con-
10 federated together and seized and caused to be seized, without right and with force, one hundred & fifty barrels of whiskey belonging to the plaintiff, and then being on his distillery premises, in Franklin County, Kentucky; said barrels containing six thousand four hundred and ninety-seven $\frac{2}{10}$ gallons of whiskey, of the value of five thousand one hundred and ninety-eight dollars, in addition to the tax

of seventy-five cents per gallon, for which the United States Government had a lien thereon; and that said defendants, without right, converted said whiskey to their own use, contrary to the remonstrance and protest of the plaintiff, and sold the said whiskey and appropriated the proceeds thereof, giving to the purchaser the right and power to remove, use, and possess said whiskey, at any time upon the payment of said tax to the government, and depriving the plaintiff of said right.

Plaintiff states that, by reason of the aforesaid unlawful acts of the defendants, he has suffered damages amounting to six thousand five hundred dollars, no part of which has been repaid to him, and he prays judgment against the defendants therefor, together with costs and all other proper relief.

J. H. PRALL, *Att'y.*

FRANKLIN Co., K'Y.

The pl'ff, Rob't P. Pepper, says he believes the statements of the foregoing petition to be true.

R. P. PEPPER.

11 Sworn to before me by Rob't P. Pepper this 29th of Jan'y, 1874.

W. FRANKLIN, *C. F. C. C.*,
By TOM T. PRICE, *D. C.*

Kentucky, Franklin circuit court, February 19th, 1874.

R. P. PEPPER, PL'FF,
vs.
RICHARD P. STOLL, &C., DEF'TS. } Ordinary.

The defendants produced and filed an order of the circuit court of the United States for the district of Kentucky, at Louisville, requiring that the record and proceedings had in this cause in this court be removed to the said circuit court of the United States for the district of Kentucky, at Louisville, and the clerk of this court is directed to transmit the papers and proceedings accordingly.

Taxation of costs.

Pepper's cost: clerk, $16 30; sheriff, 1.20—$17.50.
Defendants' costs: clerk, $1.05.

Attest: W. FRANKLIN, *C. F. C. C.*

12 STATE OF KENTUCKY:

Franklin circuit court

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing is a full, true, and complete transcript of all the orders had and made in the suit of R. P. Pepper vs. Richard P. Stoll, &c., in said court.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court at Frankfort, this 13th day of March, 1874.

[SEAL.] W. FRANKLIN, *C. F. C. C.*

I, P. W. Major, judge of the Franklin circuit court, in the State of Kentucky, do certify that W. Franklin, who has subscribed the forego-

Certiorari.

The President of the United States of America to the Franklin circuit court, in the State of Kentucky, greeting:

Whereas Richard P. Stoll and A. H. Bowman, lately officers of the United States, under the revenue laws thereof, have filed their petition in the circuit court of the United States for the district of Kentucky, at Louisville, setting forth that one Rob't P. Pepper has instituted suit in your court against them for acts done under the revenue laws of the United States; which petition has attached thereto the affidavit of said Richard P. Stoll, and the certificate of W. A. Bullitt, esqr., attorney, as required by law:

These are therefor' to require you to send to our said circuit court of the United States for the district of Kentucky, at Louisville, the record and proceeding had in said cause of Robert P. Pepper vs. Richard P. Stoll and A. H. Bowman, in said Franklin circuit court, so that the same shall be in our said circuit court before the judges thereof at the Federal court hall, in the city of Louisville, on the first day of
9 our next October term, the 5th day of October, 1874.

Witness the Hon. Nathan Clifford, associate justice of the Supreme Court of the United States, and the seal of our said circuit court, this 14th day of February, A. D. 1874.

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of seventy-five cents per gallon, for which the United States Government had a lien thereon; and that said defendants, without right, converted said whiskey to their own use, contrary to the remonstrance and protest of the plaintiff, and sold the said whiskey and appropriated the proceeds thereof, giving to the purchaser the right and power to remove, use, and possess said whiskey, at any time upon the payment of said tax to the government, and depriving the plaintiff of said right.

Plaintiff states that, by reason of the aforesaid unlawful acts of the defendants, he has suffered damages amounting to six thousand five hundred dollars, no part of which has been repaid to him, and he prays judgment against the defendants therefor, together with costs and all other proper relief.

J. H. PRALL, *Att'y.*

FRANKLIN CO., K'Y.

The pl'ff, Rob't P. Pepper, says he believes the statements of the foregoing petition to be true.

R. P. PEPPER.

11 Sworn to before me by Rob't P. Pepper this 29th of Jan'y, 1874.
W. FRANKLIN, *C. F. C. C.*,
By TOM T. PRICE, *D. C.*

Kentucky, Franklin circuit court, February 19th, 1874.

R. P. PEPPER, PL'FF,
vs.
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12 STATE OF KENTUCKY:

Franklin circuit court

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing is a full, true, and complete transcript of all the orders had and made in the suit of R. P. Pepper vs. Richard P. Stoll, &c., in said court.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court at Frankfort, this 13th day of March, 1874.

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of seventy-five cents per gallon, for which the United States Government had a lien thereon; and that said defendants, without right, converted said whiskey to their own use, contrary to the remonstrance and protest of the plaintiff, and sold the said whiskey and appropriated the proceeds thereof, giving to the purchaser the right and power to remove, use, and possess said whiskey, at any time upon the payment of said tax to the government, and depriving the plaintiff of said right.

Plaintiff states that, by reason of the aforesaid unlawful acts of the defendants, he has suffered damages amounting to six thousand five hundred dollars, no part of which has been repaid to him, and he prays judgment against the defendants therefor, together with costs and all other proper relief.

J. H. PRALL, *Att'y.*

FRANKLIN CO., K'Y.

The pl'ff, Rob't P. Pepper, says he believes the statements of the foregoing petition to be true.

R. P. PEPPER.

11 Sworn to before me by Rob't P. Pepper this 29th of Jan'y, 1874.

W. FRANKLIN, *C. F. C. C.*,
By TOM T. PRICE, *D. C.*

Kentucky, Franklin circuit court, February 19th, 1874.

R. P. PEPPER, PL'FF,
vs.
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The defendants produced and filed an order of the circuit court of the United States for the district of Kentucky, at Louisville, requiring that the record and proceedings had in this cause in this court be removed to the said circuit court of the United States for the district of Kentucky, at Louisville, and the clerk of this court is directed to transmit the papers and proceedings accordingly.

Taxation of costs.

Pepper's cost: clerk, $16 30; sheriff, 1.20—$17.50.
Defendants' costs: clerk, $1.05.

Attest: W. FRANKLIN, *C. F. C. C.*

12 STATE OF KENTUCKY:

Franklin circuit court

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing is a full, true, and complete transcript of all the orders had and made in the suit of R. P. Pepper vs. Richard P. Stoll, &c., in said court.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court at Frankfort, this 13th day of March, 1874.

[SEAL.] W. FRANKLIN, *C. F. C. C.*

I, P. W. Major, judge of the Franklin circuit court, in the State of Kentucky, do certify that W. Franklin, who has subscribed the forego-

ing certificate, is the clerk of said court, duly elected and qualified according to law, and that his said certificate is in due form.

Witness my hand this 13th day of M'ch, 1874.

[SEAL.]

P. W. MAJOR,
Judge of the Franklin Cir't Court.

Order.

And at a term of said court, held for its October term, A. D. 1874, to wit, Tuesday, October 20th, A. D. 1874, came the plaintiff by
13 Martin Bijur, his attorney; came also the defendants by G. C. Wharton, their attorney.

The defendants, by their attorney, filed their answer herein, and thereupon the parties filed their written agreement herein, which is as follows:

We agreed that the issues of fact in this case may be tried and determined by the court without the intervention of a jury, and a jury is hereby waived.

G. C. WHARTON,
U. S. Atty.
MARTIN BIJUR,
Att'y for Pl'ff.

Thereupon the court heard the evidence, and there not being time for counsel to argue the case to-day, time is given until to-morrow.

The answer above referred to was withdrawn by the defendants' attorney, and is not on the files.

And on another day of our said court, to wit, Wednesday, October 21st, A. D. 1875, came the parties by their attorneys.

The plaintiff, by his attorney, tendered his amended petition herein and moved the court for leave to file the same, to which motion the defendants, by their attorneys, objected, and the court, not being advised thereof, takes time.

And on another day of our said court, to wit, Tuesday, November 17th, A. D. 1874, came again the parties by their attorneys.

The plaintiff, by his attorney, filed his amended petition, and the
14 defendants, by their attorney, filed their amended answer herein.

The amended petition referred to above is as follows:

Amended petition.

Circuit court of the United States for the Kentucky district.

ROBERT P. PEPPER }
vs.
A. H. BOWMAN, &C. }

The plaintiff, by leave of court first obtained, amends his petition herein and says: that prior to the seizure of the one hundred barrels of whiskey complained of herein, the Commissioner of Internal Revenue for the United States made an assessment against the pl'ff, which he, the said Commissioner, called a deficiency tax, that is to say, he assessed a tax against the plaintiff—

For the month of May, 1873..... $783 93
For the month of August, 1873..... $392 03
For the month of July, 1873..... $406 98

Said tax was assessed for spirits which had then already been assessed and duly reported, and has since then been duly paid. The said assessment was made by the Commissioner upon spirits produced by plaintiff in his distillery in excess of the estimated capacity of the said distillery.

The production in excess of the estimated capacity was known
15 to and consented to by the collector, the defendant, A. H. Bowman, and was duly and regularly reported according to law, and duly assessed according to law, all of which was known to the Commissioners of Internal Revenue for the United States, and has since been duly paid. And the said assessment by the said Commissioner herein complained of, was a double assessment upon the same spirits, for the same tax already assessed as aforesaid, and was erroneous and illegal.

And after the said double assessment aforesaid, and before the seizure of the defendant's spirits herein complained of, an appeal setting forth the circumstances, and the law was made to the Commissioner of Internal Revenue of the United States, to correct the said wrongful assessment; but he refused to make the said correction, and ordered the said defendant to seize the whiskey, and collect the amount of the said assessment, which, together with the costs and penalties, amounted in all to the sum of $1,798\frac{70}{100}$, and to satisfy which the said defendant, Bowman, seized the said whiskey, and sold the same to satisfy the said sum, and realized out of the same the said sum of $1,798\frac{70}{100}$, which he, as well as the said whiskey, he unjustly withheld, and still withholds from the plaintiff.

And before the said seizure, and before the said sale, the pl'ff protested to the said defendants against the wrong, and warned
16 them that he would sue them for the value of the said property so taken from his control and possession; but the said defendant Bowman, and his co-defendant, Richard P. Stoll, not minding the said warning and protest, nevertheless seized the said 150 barrels of whiskey, the property of the plaintiff, containing 6,533 gallons of the value of sixty-five cents per gallon in bond, and worth in all the sum of $4,246\frac{45}{100}$, and sold the same as aforesaid, and so wrongfully deprived the pl'ff of his property, to the pl'ff's damage of the value of the said property, with interest from the 29th of January, 1874. Said seizure was made on the said 29th of January, 1874. No part of the said property and no part of the said money has been returned to the pl'ff.

Wherefore plaintiff prays judgment against the defendant for $4,437\frac{07}{100}$, being the principal with interest to date.

MUIR, BIJUR & DAVIE,
Attorneys for Pl'ff.

The amended answer referred to above is as follows:

Answer.

In the circuit court of the United States for the Kentucky district.

RICHARD P. STOLL, A. H. BOWMAN, } *ads.*
ROB'T P. PEPPER. }

17 And now came the said def't, A. H. Bowman and Richard P. Stoll, and, for answer to the plaintiff's petition, say that they are

not guilty of the said supposed trespasses in the plaintiff's petition laid to their charge; and for further answer say, second, that for a long time before the seizure of the one hundred and fifty barrels of whiskey complained of, and the conversion charged against the said defendants, the plaintiff, Rob't P. Pepper, was indebted to the said United States of America in a large sum of money, to wit, in the sum of $1,798\frac{17}{100}$, for and on account of the taxes due and payable on the distilled spirits which had been manufactured by the plaintiff in Franklin County, Kentucky, and interest and penalties thereon; and the said plaintiff being so liable to the said United States for the said taxes, the Commissioner of Internal Revenue, J. W. Douglass, esqr., did make assessments against the said plaintiff for the said taxes, which said assessments amounted in the aggregate to the sum of $1,582\frac{86}{100}$, the said assessments having been duly made as aforesaid in the manner required by law, under the 20th section of the act of Congress, approved July 20th, 1868, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," for taxes on spirits manufactured from grain used by the said distiller in excess of the capacity of his distillery, as estimated under the provisions of the above act.

18 The said assessments having been made as aforesaid, the same were delivered to the defendant A. H. Bowman, by the said Commissioner of Internal Revenue, and he was ordered to collect the same. He, the said A. H. Bowman, was then and there a collector of internal revenue in and for the 7th collection-district of Kentucky, in which said district the said distillery was situated, and the said plaintiff resided, and was liable for the said tax.

They further state that the said defendant did then and there give the proper notice required by law to the said plaintiff of the said assessments, and did demand payment of the taxes aforesaid, and the said plaintiff did refuse to pay the same, when the said refusal was made; the said Bowman, collector as aforesaid, after the expiration of ten days after the said demand, did issue warrants of distraint directed to the defendant Richard P. Stoll, a deputy collector of internal revenue, for the collection of the said taxes aforesaid, which said warrants commanded the said defendant to distrain upon so much of the goods, chattels, and effects of the said plaintiff as were necessary for the payment of the taxes and penalties due and owing by him, which said warrants are referred to and made part of this answer.

They further state that the said defendant Stoll, deputy collector as aforesaid, did, with the said warrants above referred to, *did* proceed to the distillery of the plaintiff, and did seize the said one hundred & fifty barrels of whiskey mentioned in the plaintiff's petition, and

19 did sell to the highest bidder the same, after having duly advertised the said spirits as required by law, and there was not bid for the same a greater sum than was necessary to pay the first above-mentioned debt of $1,798.17, and the said spirits were not worth more than the above sum after the payment the tax of seventy cents per gallon then due the United States, for which the said United States then and there held a lien, subject to which said lien the said whiskey was sold; and they further say that they appropriated the entire sum for which the spirits were sold to the payment of the said taxes, debt, interest, and costs to the said United States; and the said money was paid into the Treasury of the said United States, and no part of the same was appropriated to the use of either of the said defendants.

They further say that the seizure made as aforesaid, under the war-

rants aforesaid, is the seizne complained of in the plaintiff's petition, and that neither of them, the said defendants, have ever made any other or different seizure of or from the plaintiff of spirits.

A. H. Bowman & Richard P. Stoll say that the statements contained in the foregoing petition are true.

A. H. BOWMAN.
RICHARD P. STOLL.

20 *Facts.*

And on another day of our said court, to wit, Wednesday, November 25th, 1874, the law and the facts being submitted to the court by the written agreement of counsel upon the pleadings and the evidence, and the court being advised, finds the facts as follows:

The plaintiff, Robert P. Pepper, was a distiller within the 7th district, in the State of Kentucky, and the surveyed capacity of his distillery was $151\frac{82}{100}$ bushels per day. During the months of May, June, July, and August, 1873, he produced spirits in excess of the surveyed capacity to the number of 2,261½ gallons, on which a tax was payable amounting in the aggregate to the sum of $1,582.86.

The surveyed capacity of the said distillery was duly reported to the Commissioner of Internal Revenue, and the spirits produced, including the said excess, were drawn from the receiving cistern, and placed in the government warehouse attached to the distillery, and were duly reported and assessed, and bonds for the payment of the tax was given according to law; all of which was duly reported to the Commissioner of Internal Revenue.

Afterwards the Commissioner made an assessment of 70 cents per gallon for all the spirits produced in excess of the surveyed capacity during the months of May, June, July, and August, and directed the defendant Bowman, who is, and was then, the collector of the 7th district, to collect the same.

This assessment was made under the 20th section of the act of
21 June 6th, 1872, and was made for the same spirits upon the same number of gallons, and for the same amount for which the taxes had already, under the first regular reports, been assessed and secured by bond, and which have since been paid, so that a collection of this assessment by the Commissioner of Internal Revenue would enforce a double payment of the tax upon the spirits.

In the production of spirits in excess of the estimated capacity no evasion of law was intended, and no benefit was derived from it by plaintiff, but the distillery was run beyond its surveyed capacity with the knowledge of the government officers, including the collector.

On the 9th of January, 1874, the defendant, the collector, Bowman, his deputy, Stoll, after having made demand of plaintiff for payment of the amount assessed for the said excess, and the plaintiff having refused payment, seized 150 barrels of spirits belonging to plaintiff, and containing 6,497½ proof gallons, and, after advertising the same for ten days, sold the whole lot at Frankfort, the place of seizure, for the sum of $1,798\frac{10}{100}$, being the amount of taxes assessed, inclusive of costs and penalties.

Said plaintiff before and at the time of seizure, and at the sale, in writing protested to the defendants against the said proceedings, and notified them that he would hold the defendants liable; and at the
22 time of the sale of the said spirits the plaintiff was present, and

warned bidders that the sale was illegal, and he would hold the purchasers responsible for the value of the whiskey.

And before this suit was brought the plaintiff appealed to the Commissioner of Internal Revenue, according to law, for the correction of the said assessments as erroneous and illegal, and the said appeal was rejected. And the spirits seized at the time of the seizure and up to the time of sale were of the market value of 55 cents per gallon, and, therefore, of the aggregate value of $3,573\frac{62}{100}$, but it sold for only $1,798\frac{70}{100}$ in consequence of plaintiff's protest against the sale and notification that he would hold the purchaser responsible for the property; and the court is of the opinion that the said second assessment by the Commissioner of Internal Revenue is not authorized by law, but that the plaintiff cannot recover of the collector and the deputy collector, acting under the assessment of the Commissioner, more than the amount actually collected, with interest at the rate of six per centum per annum.

Judgment.

Wherefore the judgment of the court is, that the plaintiff recover of the defendants, Richard P. Stoll and A. H. Bowman, the sum of eighteen hundred and eighty-seven and $\frac{43}{100}$ dollars, with interest thereon at the rate of six per centum per annum from the 25th day of November,
23 1874, until paid, and his costs herein expended, and may have execution of fi. fa.

DISTRICT OF KENTUCKY:

I, W. A. Meriwether, clerk of the court of the United States for the Kentucky district, at Louisville, do certify that the foregoing seventeen pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my signature and the seal of said court, at Louisville, this 25th day of March, 1875.

[SEAL.]

W. A. MERIWETHER, *Clerk*,
By SAM. B. CRAIL, *D. C.*

(Indorsement on cover:) No. 337. Richard P. Stoll, collector, and A. H. Bowman, deputy collector of internal revenue, plaintiffs in error, vs. Robert P. Pepper. Kentucky C. C. U. S. Filed 31st December, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

STOLL, COLLECTOR, &c.,
vs.
ROBERT P. PEPPER. } No. 76.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

STOLL, COLLECTOR, &C., *vs.* ROBERT P. PEPPER. } No. 76.

BRIEF FOR THE UNITED STATES.

The facts in this case occurred in 1873, and are briefly and plainly stated on the ninth page of the record.

The acts which controlled the transaction in question, as well as the payment of taxes upon spirituous liquors in general, are as follows, being taken from the compilation of 1873, published by the Department of the Treasury:

That there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of seventy cents on each and every proof gallon, to be paid by the distiller, owner, or person having possession thereof before removal from distillery warehouse; and the tax on such spirits shall be collected on the whole number of gauge or wine gallons.—*Compilation of* 1873, p. 54, citing acts of July 20, 1868, s. 1, and of June 6, 1872, s. 12.

* * * * *

That every person engaged in, or intending to be engaged in, the business of a distiller or rectifier shall give

notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and if a company or firm, the name and place of residence of each member thereof, the place where said business is to be carried on, and whether of distilling or rectifying. And if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. In case of a distiller, the notice shall also state the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash-tubs and fermenting-tubs, and the cubic contents of each tub, the number of receiving-cisterns and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The notice shall also state the number of hours in which the distiller will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, and the names and residence of every person interested or to be interested in the business, and that said distillery and the premises connected therewith are not within six hundred feet of any premises authorized to be used for rectifying or refining distilled spirits by any process. In case of a rectifier the notice shall state.—*Compilation*, p. 56 (July 20, 1868, s. 6).

* * * * *

That every distiller and person intending to engage in the business of a distiller shall, previous to the approval of his bond, cause to be made, under the direction of the assessor of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm-tub, and receiving-cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch thereof, and of every cock or point thereof, and of every valve therein, together with every place, vessel, tub, or utensil from

and to which any such pipe shall lead, or with which it communicates. Such plan and description shall also show the number and location and cubic contents of every still, mash-tub, and fermenting-tub, together with the cubic contents of every receiving-cistern and the color of each fixed pipe, as required in this act. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery; two copies shall be furnished to the assessor of the district, one of which shall be kept by him and the other transmitted to the Commissioner of Internal Revenue. The accuracy of every such plan and description shall be verified by the assessor, the draughtsman, and the distiller; and no alteration shall be made in such distillery without the consent, in writing, of the assessor, which alteration shall be shown on the original or by a supplemental plan and description, and a reference thereto noted on the original, as the assessor may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

That on the receipt of notice that any person wishes to commence the business of distilling, the assessor shall proceed at the expense of the United States, with the aid of an assistant designated for the purpose by the Commissioner of Internal Revenue, to make a survey of such distillery for the purpose of estimating and determining its true spirit-producing capacity for a day of twenty-four hours, a written report of which survey shall be made in triplicate, one copy of which shall be delivered to the distiller, and shall take effect on and after the date of such delivery, one copy retained by the assessor, and the other transmitted to the Commissioner of Internal Revenue.

In all surveys made under this act forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses, except in distilleries operating on the sour-mash principle, in which distilleries sixty gallons of beer brewed or

fermented from grain shall represent not less than one bushel of grain. If the Commissioner of Internal Revenue shall at any time be satisfied that such report of the capacity of any distillery is in any respect incorrect or needs revision, he shall direct the assessor to make, in like manner, another survey of said distillery, the report of said survey to be made in triplicate and deposited as hereinbefore provided.—*Compilation*, pp. 59 and 60 (July 20, 1868, ss. 9 and 10, and June 6, 1872, s. 12).

* * * * *

That every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits, of his own manufacture, until the tax thereon shall have been paid; but no dwelling-house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery, or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal-revenue storekeeper, assigned thereto by the Commissioner of Internal Revenue, and the tax on the spirits stored in such warehouse shall be paid before removal from such warehouse.

No distilled spirits on which the tax has been paid shall be stored or allowed to remain on any distillery premises, under the penalty of a forfeiture of all spirits so found.—*Compilation*, p. 62 (July 20, 1868, s. 15, and June 6, 1872, s. 12).

* * * * *

That every person making or distilling spirits, or owning any still, boiler, or other vessel used for the purpose of distilling spirits, or having such still, boiler, or other vessel so used under his superintendence, either as agent or owner, or using any such still, boiler, or other vessel, shall, from day to day, make, or cause to be made, true

and exact entry in a book or books, to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, of the kind of materials and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits; from whom and when purchased, and by what conveyance delivered at said distillery, together with the amount paid therefor; the kind and quantity of fuel purchased for use in the distillery, and from whom purchased; the amount paid for ice or water for use in the distillery; the repairs placed on said distillery or distilling apparatus; the cost thereof, and by whom and when made, and the name and residence of each person employed in or about the distillery, and in what capacity employed; and in another book shall make like entry (of) the quantity of grain or other material used for the production of spirits; the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation; the quantity of mash in each tub, designating the same by the number of the tub; the number of dry-inches—that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting; the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, the time when any fermenting tub is emptied of ripe mash or beer; the number of gallons of spirits distilled; the number of gallons placed in warehouse, and the proof thereof, and the number of gallons sold or removed with the proof thereof, and the name, place of business and residence of the person to whom sold; and every fermenting-tub shall be emptied at the end of the fermenting period, and shall remain empty for a period of twenty-four hours.

On the first * days of each month, or within five days thereafter, respectively, every distiller shall render to the assistant assessor an account in duplicate, taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits

produced and placed in warehouse. And the distiller, or the principal manager of the distillery, shall make and subscribe the following oath, to be attached to said return:

"I, ——— ———, distiller (or principal manager, as the case may be), of the distillery at ———, do solemnly swear that, since the date of the last return of the business of said distillery, dated —— day of ——— to —— day of ———, both inclusive, there was produced in said distillery and withdrawn and placed in warehouse, the number of wine gallons and proof gallons of spirits, and there were actually mashed and used in said distillery, and consumed in the production of spirits therein, the several quantities of grain, sugar, molasses, and other materials, respectively, hereinbefore specified, and no more."—*Compilation*, pp. 64, 65 (July 20, 1868, s. 19, and June 6, 1872, s. 12).

* * * * *

That on the receipt of the distiller's return in each month the assessor shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If the assessor is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported shall be found to be less than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act, an assessment shall be made for such deficiency at the rate of seventy cents for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the assessor finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated under the provisions of this act, an assessment shall be made against the distiller at the rate of seventy cents for every proof gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds eighty per centum of the producing capacity of the distillery. If the assessor finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he

can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of seventy cents for every proof gallon: Provided, That the actual product shall be assumed to be in no case less than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act, or under the act to which this is an amendment.

Any and all assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the tract of land whereon the said distillery is located, together with any building thereon, from the time such assessment is made until the same shall have been paid.—Compilation, p. 66 (July 20, 1868, s. 20, and June 6, 1872, s. 13).

* * * * *

That if any distiller shall desire to reduce the producing capacity of his distillery, he shall give notice of such intention in writing to said assessor, stating the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said assessor shall proceed at the expense of the distiller to reduce and limit the producing capacity of the distillery to the quantity stated in said notice, by placing upon a sufficient number of the fermenting tubs close-fitting covers, which shall be securely fastened by nails, seals, and otherwise, and in such manner as to prevent the use of such tubs without removing said covers, or breaking said seals, and shall adopt such other precautions as shall be prescribed by the Commissioner of Internal Revenue to reduce the capacity of said distillery. And any person who shall break, injure, or in any manner tamper with any lock, seal, or other fastening applied to any furnace, still, or fermenting tub, or other vessel, in pursuance of the provisions of this act, or who shall open or attempt to open any door, tub, or other vessel which shall have been locked or sealed, or otherwise closed or fastened as herein pro-

vided, or who shall use any furnace, still, or fermenting tub or other vessel which shall be so locked, sealed, or fastened, shall be deemed guilty of a felony, and, on conviction shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned for not less than one year nor more than three years.—*Compilation*, pp. 72 and 73 (July 20, 1868).

* * * * *

That all distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States. * * * And any person who shall remove or shall aid or abet in the removal of any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or who shall conceal or aid in the concealment of any spirits so removed, or who shall remove or shall aid or abet in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or who shall conceal or aid in the concealment of any spirits so removed, shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall on conviction be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years.

Provided, That the tax upon any spirits distilled and removed from the place where the same were distilled and not deposited in bonded warehouse as required by law, shall, at any time, upon knowledge of such fact obtained by the assessor or assistant assessor of the district where such spirits were distilled, be assessed by him upon the distiller of the same, and certified or returned to the collector, who shall immediately demand payment of such tax, and upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.—*Com-*

pilation, p. 74 (July 20, 1868, s. 36, and March 2, 1867, s. 14, proviso).

* * * * * *

That any person who shall evade or attempt to evade the payment of the tax on any distilled spirits, in any manner whatever, shall forfeit and pay double the amount of tax so evaded or attempted to be evaded; and any person who shall change or alter any stamp, mark, or brand, on any cask, &c.—*Compilation*, p. 76 (July 20, 1868).

* * * * * *

That every person engaged in carrying on the business of a distiller, who shall defraud or attempt to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.—*Compilation*, p. 79 (March 31, 1868, s. 5).

The above copious extracts from the revenue laws have been made in order that the court may have immediately before them the statutory provisions relied upon in behalf of the government to show that the provisions of the section above italicized, which apply to the present case, do not enforce *the ordinary tax*, but are *additional* to the provisions for such tax, and operate to impose a slight penalty for a violation of *regulations as to capacity*, regulations intended by the United States to facilitate a *bona-fide* assessment and collection of the ordinary tax.

The error now assigned is that the learned judge below virtually held the contrary, and so gave judgment for the plaintiffs.

It seems that the method by which taxes in ordinary are collected upon spirits which go into the distiller's warehouse is by a return of such spirits as the *amount produced.* This tax is payable without reference to the quantity of grain used in producing the spirits, and the means of enforcing it are obvious.

If what is intended by the clause in question is no more than to enforce the ordinary tax, it is superfluous; *for if spirits go into the warehouse* they thereby go into the hands of the government, which holds them until the tax is paid or secured; and *if they are diverted from the warehouse* they come under the operation of the third clause of the above section as not having been accounted for.

The second clause, therefore, has a different operation, and levies a tax which is *in addition* to that ordinarily assessed, a tax which is assessed upon the spirits "*that should have been produced,*" not upon the amount actually produced. The clause makes no provision for deducting from this assessment the spirits actually produced and accounted for. Yet Congress must have foreseen that the clause would apply in many cases where there had been no fraud by the distiller, and therefore where the actual product of his distillation had gone into the warehouse, and its tax been secured or paid. The contention upon the other side is that the phrase above quoted is to be read, "that should have been produced beyond what has otherwise *been accounted for.*" But the words justify no such qualification.

It is intended thereby to check distillation in excess of the declared capacity of the distillery.

In ascertaining and declaring the capacity of a distillery it is the purpose of the government to enable its

revenue officers, of all grades, intelligently and readily to deal with the transactions of the distiller. What Congress has in that connection provided is a set of entries upon record, constituting checks as well upon the distiller as upon the subordinate officials who come in contact with him.

It is evident that the specific checks actually created by statute must be enforced. No other checks can by substituted. Much less can actual honest dealing of a distiller in a particular case, even with the privity of subordinate or other officials, atone for a violation of the law.

Congress has not chosen to rely upon the probity of distillers; and also has not intrusted subordinate revenue officers with *dispensing* power.

Indeed, it is difficult to see how the distiller could have avoided paying the ordinary tax (a payment alluded to in the record as *meritorious*) without incurring other and *severe* penalties for *removing spirits, for failing to account, &c.* There is therefore nothing pertinent to the contention here in the statement that he had secured and paid the ordinary tax, as all that follows from that statement is that *he has not carried on his operations so as to incur any other penalties than that in question.*

S. F. PHILLIPS,
Solicitor-General.

Supreme Court of the United States.

No. 76.

P. STOLL, Collector, and
A. H. BOWMAN, Deputy Collector,
Plaintiffs in Error.
VERSUS
ROBERT P. PEPPER,
Defendant in Error.

Argument for Defendant in Error.

BIJUR & DAVIE, Counsel,

Thos. D. Bullitt

Courier-Journal Print.

Supreme Court of the United States.

No. 76.

R. P. STOLL, Collector, and
A. H. BOWMAN, Deputy Collector,
Plaintiffs in Error,
VERSUS
ROBERT P. PEPPER,
Defendant in Error.

Argument for Defendant in Error.

The defendant in error, R. P. Pepper, was the owner and operator of a distillery in Franklin county, Kentucky, within the Seventh Internal Revenue District of Kentucky.

The distillery had a *surveyed* capacity of 151 82-100 bushels per day, but had a *real* capacity considerably greater.

During the months of May, June, July and August, 1873, the defendant in error ran his said distillery at its *real* and above its *surveyed* capacity, and produced 2,261¼ gallons of whisky more than would have been produced had he run it only at its surveyed capacity.

The whisky so produced in excess of the surveyed capacity was duly reported to the Commissioner, and assessed by him with the regular tax of 70 cents per gallon, which was paid by the defendant in error.

"In the production of spirits in excess of the estimated capacity, no evasion of law was intended, and no benefit was derived from it by the (defendant in error) but the distillery was run beyond its surveyed capacity with the knowledge of the government officers, including the collector (plaintiff in error)." (See findings of facts.)

Neither the distiller nor the collector, nor any party concerned, had any idea that there was any legal objection to the course pursued, nor was there any objection raised either by the collector or

by the Commissioner at Washington, who were aware of the surveyed capacity of the distillery, and to whom the monthly returns and reports and assessments constantly disclosed the fact that the distillery was being run above its surveyed capacity.

Afterwards, in January, 1874, the Commissioner at Washington seems to have conceived the idea that because the distiller had not given a formal *written* notice of his intention to run his distillery above its surveyed capacity, he had committed a breach of one of the commissioner's rules and regulations, and that the commissioner had, somehow, a right to punish him for it by making him pay a double tax on the amount of whisky so produced in excess.

He therefore made a second assessment of 70 cents per gallon on those 2,261¼ gallons, which assessment came into the hands of the plaintiffs in error as collectors, and were by them levied upon 150 barrels of whisky belonging to defendant in error. Said whisky was sold by the plaintiffs in error at public auction, for the sum of $1,798.70, the amount of the assessment and interest and costs.

During all those proceedings the defendant earnestly and constantly protested against them as illegal, and afterwards appealed to the Commissioner for relief. His protest being disregarded, and all relief being denied him, he brought this action in trover against the collector and his deputy for the value of the 150 barrels of whisky, so illegally seized and converted by them.

The court below found that the value of the whisky was $3,573.62, but rendered judgment for defendant in error for only $1,798.70, the amount the whisky sold for.

The plaintiffs in error have sued out this writ of error upon that judgment.

In their answer the plaintiffs in error attempt to justify their action upon two grounds:

First—Because the second assessment was warranted by the 20th section of the Internal Revenue act of July 20, 1868 (amended and remodeled by the 20th section of the act of June 6, 1872.) See United States Statutes at Large, Vol. 15, Page 133; United States Statutes at Large, Vol. 17, page 243, and United States Revised Statutes, sections 3,309, and 3,264.

Second—Because all that they did was in subordination and in obedience to the directions of their superior officer, the Commissioner of Internal Revenue.

It is sufficient to say, as to the second defense, that the fact that one acts under the direction of another in committing a wrongful conversion, has never been held a protection to him from liability, especially where, as in this case, he was notified and warned beforehand of the illegality of the act. Stevens vs. Elwall, 4 Maule & Selwyn, 261. Fowler vs. Hollins, Law Reports, 7 Eng. and Irish Appeals, 766.

We need therefore only consider the first defense.

Section 12 of the act of 1872 provides that when one begins distilling, the collector shall proceed to make a survey of the distillery for the purpose of estimating its spirit-producing capacity, and shall from time to time correct such estimate, if he discovers it is too little or too great. This estimate is of course only expected to be a mere approximation; as the distiller will always necessarily run a little above or a little below it. He can not run to the exact fraction of the estimate.

Said section 20 of the act of 1872, is as follows: "That on the receipt of the distiller's return in each month, the assessor shall inquire whether the distiller has accounted for all the grain and molasses used, and all the spirits produced by him in the preceding month. If the assessor is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported shall be found to be less than 80 per centum of the producing capacity of the distillery as estimated under the provisions of this act, an assessment shall be made for such deficiency at the rate of 70 cents for every proof gallon. In determining the amount of grain used, fifty-six pounds shall be counted as a bushel; and if the assessor finds that the distiller has used any grain or molasses in excess of the capacity of his distillery, as estimated under the provisions of this act, an assessment shall be made against the distillery at the rate of seventy cents for every proof gallon of spirits that should have been produced from the grain or molasses used in excess, which assessment shall be made whether the quantity of spirits is equal to or exceeds eighty per centum of the producing capacity of the distillery. If the assessor finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain, *determine what quantity of spirits was actually produced by such distiller*, and an assessment shall be made for the difference between the quantity reported, and the quantity *shown to have been actually produced*, at the rate of seventy cents per proof gallon: Provided, that the actual product shall be assumed to be in no case less than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act or under the act to which this is an amendment. Any and all assessments made under this section shall be a lien on all the distilled spirits, on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the tract of land whereon the said distillery is located, together with any buildings thereon, from the time said assessment is made until the same shall have been paid."

It will be seen from a careful reading of that section that its *purpose* is contained in the first clause thereof. That purpose is to ascertain whether the distiller has accounted for all the grain or molasses used, and for all the spirits produced in the preceding month.

The second clause provides for assessing the spirits so found to have been actually produced, with a tax of 70 cents per gallon; or for assessing at the rate of 70 cents per gallon on an amount of spirits

equal to 80 per cent. of the surveyed capacity, whether that amount was actually produced or not. If the distiller produces more than 80 per cent. of his surveyed capacity, he is to be taxed on the basis of the amount actually produced. If he produces less than the 80 per cent. he must be taxed the same as if he had produced the 80 per cent.

The third clause points out the *method* of ascertaining the amount actually produced, and provides that if the assessor finds that the distillery has been using an amount of grain or molasses above its surveyed capacity, then an assessment of 70 cents per gallon shall be made on the spirits that were or should have been made out of the grain mashed in excess of the surveyed capacity.

The fourth clause provides that if the assessor finds that the distiller has actually produced more spirits than he has reported, there shall be a tax of 70 cents per gallon assessed against that excess.

It will thus be seen that in the first place, a case like this, where the distiller has, with the consent of the revenue officers, produced more spirits than his surveyed capacity, but has fully reported it all, and paid taxes on it all, is not provided for in that section; and, in the second place, that the whole purpose and spirit of that statute is to have *one* tax of 70 cents on all spirits produced, and that there is no penalty of double taxation provided for. The purpose of the government is to stimulate production, and while there are provisions in those acts requiring the distiller to pay a tax on a basis of 80 per cent. of his surveyed capacity, irrespective of the amount produced, thus stimulating him not to produce *less* than that amount, there is no provision repressing production by prohibiting his producing *more* than his surveyed capacity. The surveyed capacity is fixed for the purpose of preventing his producing too little.

We have been unable to find in that section, or in any other section of that act or of any act of Congress, any provision authorizing the Commissioner to inflict the punishment of double taxation upon the distiller for producing above his surveyed capacity. On the other hand, the whole statute is pervaded with the just idea that taxation shall be uniform, and that one gallon produced shall pay the same, and no more, than another. All that this court has ever required in construing that act, is that the distiller shall in good faith pay the tax on all he produced or should have produced. Technical accidents and misconceptions of the statute are always disregarded. Clinkbeard vs. U. S., 21 Wallace, 65. Felton vs. U. S., 6 Otto, 702.

Section 12 of that act (Vol. 17, page 238) provides that a tax of 70 cents shall be assessed against each gallon "on all distilled spirits on which the tax prescribed by law *has not been paid.*" But nowhere is there a provision for assessing any tax on whisky on which the tax prescribed by law *has* been paid. And the imposition of double taxation, like other penalties, is a prerogative of the legislature, and can not be supported except by a plain, direct legislative enactment.

It may be that in the almost innumerable rules, regulations, orders, instructions, decisions, hints and suggestions which have poured out daily from the fluent pens of the successive Commissioners and their countless deputies, there may be found some proviso or ruling to the effect that if any distiller should, though innocently and with the approval of the revenue officers, produce above his surveyed capacity, he should be punished for his skill and enterprise by double taxation.

We have not been able to find any such rule, nor was the learned court below acquainted with any such; and we might well presume, in favor of the good sense of the Revenue Department, that no such rule exists.

In the court below, No. 7, of Series 6, of the regulations of the treasury was relied on. It is as follows:—"Distillers are not authorized to produce a greater or less number of gallons to the bushel of grain or gallon of molasses in setting the mash or beer, than the number of gallons fixed in the survey, without first giving the notice required in case of change of capacity." It is obvious, however, that that rule has no applicability here In the first place, it does not appear in this case that the distiller did produce a greater number of gallons to the *bushel* than was allowed; and, in the second place, the Court has found that the officers knew of all that was done which dispensed with formal notice; and, in the third place, not even that rule fixes a penalty for its disobedience. It says nothing of double taxation.

If, however, there should be a penal *rule* unearthed, it is clearly void and ineffectual for lack of power in the Commissioner or his deputies to promulgate it.

The power to impose taxation is a purely legislative power. It has been styled the highest prerogative of a government. It is to a state what the right of self-preservation is to a man—the first law of nature. And the right to inflict double taxation by way of a penalty is certainly none the less a sovereign power, to be exercised, not by a Commissioner, but by Congress alone. It was no more in the power of the Commissioner to levy double taxes than it was to levy war; and he had no more right to prescribe and inflict the penalty of double taxation, than the punishment of fine, or imprisonment, or death. No such thing was ever countenanced in our government as a Commissioner of revenue assuming to himself the legislative power of enacting a penal law, the judicial power of determining that a particular case is a violation of that law, and the executive power of enforcing the sentence by seizure and sale.

It can not be seriously contended that the Commissioner acquired this high right by reason of the general power given to him by section 2 of said act to adopt rules and regulations in pursuance of and for the proper execution of the duties and powers conferred on him by Congress. A rule inflicting double taxation can not be said to be proper for the execution of a statute which fixes only a single taxation.

"The rules and regulations which the Commissioner of Internal

Revenue is authorized by section 2 of the act (of July 20, 1868) to prescribe, may aid in carrying the law into execution, but they can not change its positive regulations." United States vs. 200 bbls. Whisky, 5 Otto, 571.

We have not seen the argument of the counsel for plaintiff in error, nor their assignment of errors. We therefore can not tell what other points they may raise.

It was insisted in the court below, however, and may be urged here, that the 20th section provides that the Commissioner shall make an *assessment* on the *excess* produced, as an *excess*, and that until he does so there can be no tax properly paid on it; and that, therefore, the former tax paid in this case was not *properly* paid, and is, therefore, no bar to the present assessment. To this we answer that, in the first place, the court below expressly found the fact to be that "the spirits produced, *including the said excess*, * * were *duly* reported and *assessed*, * * and the tax has since been paid"; and in the second place, that it is the payment of the tax and not the mode of payment at which the statute aims; and in the third place, that the collector and the government having received the sum in payment of that tax at the time, are now estopped to say they did not properly receive it.

We ask an affirmance. Respectfully,

BIJUR & DAVIE,

for Defendant in Error.

Thos. H. Bullitt